92-389

No.

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1992

RICHARD CHENEY, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

DUSTY PRUITT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Army Regulation 135-175, § VII, providing for the separation from the service of persons who engage in or demonstrate a propensity to engage in homosexual conduct, violates the equal protection component of the Fifth Amendment.

2. Whether the court of appeals erred in refusing to sustain the Regulation on the basis of the reasons set forth in the Regulation, and instead requiring the Army to proceed to trial to justify the Regulation under an "active" rational basis test, without relying on social disapproval of homosexuality.

PARTIES TO THE PROCEEDING

Petitioners, the defendants below, are Richard Cheney, Secretary of Defense, Michael P.W. Stone, Secretary of the Army, and Ronald W. Zeltman, Brigadier General and Commanding Officer of the U.S. Army Reserve Components Personnel and Administration Center. Respondent, the plaintiff below, is Carolyn D. "Dusty" Pruitt.

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The Solicitor General, on behalf of Richard Cheney, Secretary of Defense, Michael P.W. Stone, Secretary of the Army, and Ronald W. Zeltman, Brigadier General and Commanding Officer of the U.S. Army Reserve Components Personnel and Administration Center, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 3a-20a) is reported at 963 F.2d 1160. The opinion of the district court (App., *infra*, 21a-25a) is reported at 659 F. Supp. 625.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1991. A petition for rehearing was denied on May 8, 1992. App., *infra*, 1a-2a. On July 29, 1992, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including September 5, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

REGULATORY PROVISIONS INVOLVED

Section VII of Army Regulation 135-175 ("Separation for Homosexuality") is reprinted, in pertinent part, at App., *infra*, 26a-28a.

STATEMENT

1. Respondent Carolyn D. "Dusty" Pruitt served on active duty in the Army between 1971 and 1975, rising to the rank of captain. She then left active-duty service to seek ordination as a minister, but remained in the Army Reserve. In 1982, the Army informed Pruitt that she had been selected for promotion to the rank of major, effective February 6, 1983. App., *infra*, 4a.

On January 27, 1983, the *Los Angeles Times* published an interview with Pruitt in which she stated that she was a lesbian and had twice gone through marriage ceremonies to other women. Since Army Regulation (AR) 135-175, § VII, ¶ 2-37(a), provides that "[t]he presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission," the Army

suspended Pruitt's promotion to major pending further investigation. App., *infra*, 4a-5a.

The Army subsequently convened an Administrative Board to determine Pruitt's continued suitability for military service. The Board accepted into evidence: (1) the Complaint for Declaratory Relief that Pruitt had filed in this action in April 1983, in which she stated that she is a homosexual (judicial proceedings were stayed while the administrative proceeding was pending); (2) the *Los Angeles Times* article in which Pruitt was quoted as stating that she had gone through two homosexual marriage ceremonies (and one divorce proceeding); (3) a letter of May 1984 from Pruitt to the Army in which she stated that she is a homosexual; and (4) Pruitt's military record. Pruitt attended the proceeding and was represented by legal counsel, but she did not testify or otherwise challenge the veracity of the newspaper article. App., *infra*, 6a.

Army regulations specify that an officer "shall be separated" if the officer "has married or attempted to marry a person known to be of the same biological sex" (unless, for example, the marriage is a ploy to avoid military service), AR 135-175, § VII, ¶ 2-39(c), and accordingly the Board recommended that Pruitt be discharged. The Board's recommendation was accepted by the Army's review authority, and Pruitt received an honorable discharge on July 9, 1986. App., *infra*, 7a.

2. In district court, Pruitt contended that the Army's regulation is contrary to the First Amendment. Noting that the regulation defines "homosexual" to include a person who "desires to engage in, or intends to engage in homosexual acts," as well as a person who "engages in" such acts, Pruitt asserted

that the regulation impermissibly "calls for punishment solely on the basis of her assertion of her status rather than because of any conduct in which she engaged." App., *infra*, 23a, quoting AR 135-175, § VII, ¶ 2-38(a).

The district court rejected Pruitt's argument. It first examined the rationale underlying the Army's policy, which is set out in the regulation itself:

> The presence of [homosexual] members adversely affects the ability of the armed forces to maintain discipline, good order, and morale; to foster mutual trust and confidence among members; to insure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of members who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the Armed Forces; to maintain the public acceptability of military service; and to prevent breaches of security.

AR 135-175, § VII, ¶ 2-37(a). The court went on to conclude that, under that rationale, "it makes little difference whether a person has committed homosexual acts, or would like to do so, or intends to do so." App., *infra*, 24a. "Certainly," the court stated, "the morale factor could reasonably be considered to be the same, and the Army understandably would be apprehensive of the prospect that desire or intent would ripen into attempt or actual performance." *Ibid.* The court therefore dismissed respondent's action for failure to state a claim. *Id.* at 4a, 25a.

3. Pruitt appealed the dismissal of her First Amendment claim. She also contended, for the first time on appeal, that the Army's regulation violates

the equal protection component of the Fifth Amendment to the extent it discriminates on the basis of homosexual status.

The court of appeals affirmed the dismissal of Pruitt's First Amendment claim. The court concluded "[t]hat it was her homosexuality, and not her speech, that caused Pruitt to be discharged." App., *infra*, 11a.

The court held, however, that the district court erred by failing to discern and address Pruitt's equal protection claim. It further rejected the government's submission that respondent's claim is legally insufficient on its face. App., *infra*, 13a. The court distinguished *Beller* v. *Middendorf*, 632 F.2d 788 (1980), certs. denied, 452 U.S. 905 and 454 U.S. 855 (1981), a Ninth Circuit decision upholding the discharge of three homosexuals from the Navy, in part because the service members in that case "had engaged in homosexual acts." App., *infra*, 13a. Pruitt, in contrast, was discharged on account of her "homosexual status," according to the court. *Id.* at 14a.

The court further concluded that the rationale of *Beller* was undermined, "[t]o the degree that [the decision] * * * rested on prejudice of others against homosexuals," by this Court's decision in *Palmore* v. *Sidoti*, 466 U.S. 429 (1984). App., *infra*, 14a. In *Beller*, the court had held (per Kennedy, J.) that "[t]he Navy can act * * * to insure the acceptance of men and women in the military, who are sometimes stationed in foreign countries with cultures different from our own," and that "the Navy could conclude that a substantial number of naval personnel have feelings regarding homosexuality, based upon moral precepts recognized by many in our society as legiti-

mate, which would create tensions and hostilities." 632 F.2d at 811. Such concerns were contrary to *Palmore*, the court of appeals said, because in *Palmore* this Court held that a mother could not be denied custody of her child on account of social disapproval of her interracial marriage. See 466 U.S. at 433.

The court of appeals similarly attempted to distinguish the various other court of appeals decisions upholding the military policy excluding homosexuals from the service, including *Hatheway* v. *Secretary of the Army*, 641 F.2d 1376 (9th Cir.), cert. denied, 454 U.S. 864 (1981); *Dronenburg* v. *Zech*, 741 F.2d 1388 (D.C. Cir. 1984); *Rich* v. *Secretary of the Army*, 735 F.2d 1220 (10th Cir. 1984); and *Woodward* v. *United States*, 871 F.2d 1068 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990). The court noted that in the first three cases there was proof of homosexual conduct. App., *infra*, 15a n.4. The court acknowledged that the Federal Circuit's decision in *Woodward* could not be distinguished since the court in that case upheld the discharge of a service member who sought authorization to act as an "open, 'gay' officer" and no actual proof of homosexual conduct was presented. See 871 F.2d at 1070; App., *infra*, 15a n.4. The court of appeals in this case found *Woodward* to be questionable authority, however, because the *Woodward* court deferred to the military's justifications for its discharge policy, including justications based on social disapproval of homosexuality. See 871 F.2d at 1076-1077; App., *infra*, 15a n.4.

The court of appeals went on to hold that its decision in *High Tech Gays* v. *Defense Industrial Security Clearance Office*, 895 F.2d 563 (9th Cir. 1990), mandated application of "the type of 'active' rational

basis review employed by the Supreme Court in *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432 (1985)." App., *infra*, 16a. Evidently, under this heightened standard, the Army's regulation cannot be sustained on the basis of the justifications set out in the regulation itself. Rather, the Army must submit "evidence justifying its regulation," and Pruitt must be afforded the "opportunity to dispute that evidence." App., *infra*, 14a. This Court's decision in *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), upholding a criminal sodomy law against a substantive due process challenge, posed no barrier to application of heightened scrutiny, the court held, since *Bowers* v. *Hardwick* was a case "relating to conduct, not orientation." App., *infra*, 17a n.5. The court of appeals also determined that this Court's decisions emphasizing the importance of deference to military judgments—such as *Rostker* v. *Goldberg*, 453 U.S. 57 (1981), and *Goldman* v. *Weinberger*, 475 U.S. 503 (1986)—did not preclude "active" rational basis review. App., *infra*, 18a.

REASONS FOR GRANTING THE PETITION

The court of appeals should have affirmed the dismissal of Pruitt's complaint. Similar military regulations have been upheld in the face of equal protection challenges by four other circuits. *Ben-Shalom* v. *Marsh*, 881 F.2d 454, 463-466 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); *Woodward* v. *United States*, 871 F.2d 1068, 1075-1077 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); *Dronenburg* v. *Zech*, 741 F.2d 1388, 1391, 1398 (D.C. Cir. 1984); *Rich* v. *Secretary of the Army*, 735 F.2d 1220, 1229-1230 (10th Cir. 1984). Those courts correctly concluded that the military's policy of discharging persons who engage in, desire to engage in, or intend to engage in homosexual acts advances legitimate military goals. Moreover, even accepting for the moment the court of appeals' contention (Pet. App. 15a n.4) that *Dronenburg* and *Rich* are distinguishable because proof of particular homosexual acts was presented in those cases, *Ben-Shalom* and *Woodward* are not distinguishable on that (or any other) basis. See 881 F.2d at 464; 871 F.2d at 1074 n.6.

The court of appeals committed three subsidiary errors in the course of reinstating Pruitt's complaint. First, the court found that the Army's regulation classifies on the basis of mere "status" rather than propensity to commit homosexual acts. That conclusion is incorrect and conflicts with the Seventh Circuit's conclusion in *Ben-Shalom* that a similar regulation "does not classify plaintiff based merely upon her status as a lesbian, but upon reasonable inferences about her probable conduct in the past and in the future." 881 F.2d at 464. Second, the court of

appeals concluded that the regulation could not be justified on the basis of social disapproval of homosexuality. The other courts of appeals, in contrast, correctly accepted justifications that are indistinguishable from those set out in AR 135-175, § VII, ¶ 2-37(a), and which rest in part on social disapproval of homosexuality. *Woodward*, 871 F.2d at 1076-1077; *Dronenburg*, 741 F.2d at 1398; *Rich*, 735 F.2d at 1227 n.7, 1229. Third, the other courts of appeals properly applied the familiar rational basis test rather than a heightened standard of review. *Ben-Shalom*, 881 F.2d at 465; *Dronenburg*, 741 F.2d at 1398; *Rich*, 735 F.2d at 1229. In fact, in marked contrast to the approach taken by the court of appeals in this case, the Federal Circuit in *Woodward* noted that "[s]pecial deference must be given by a court to the military when adjudicating matters involving their decisions on discipline, morale, composition and the like." 871 F.2d at 1077.

In light of the conflicts in the circuits, prompt review is warranted. There is no good reason to require the Army to defend its regulation (1) under the erroneous premise that the regulation classifies service members on the basis of their "status" alone, (2) without being able to invoke justifications based on social disapproval of homosexuality, and (3) under an inappropriate heightened standard of review. This Court should instead grant the petition and dispose of the case by affirming the district court's dismissal of the complaint.

A. The court of appeals should have dismissed Pruitt's equal protection claim. Moreover, each of its three subsidiary holdings are erroneous. Neither the court's failure to dismiss nor its subsidiary holdings may be reconciled with decisions of other circuits.

1. In *Ben-Shalom*, the Seventh Circuit concisely and correctly analyzed a similar equal protection argument, and held that there was no basis for the claim. The court said that the regulation at issue, which is similar in all pertinent respects to AR 135-175, § VII (see 881 F.2d at 457 n.3), "clearly promotes a legitimate government interest." *Id.* at 465. The court did not cite any empirical evidence justifying the regulation, but instead concluded that "this particular classification is supported by military considerations and should be left to the Army." *Ibid.* Similarly, in *Woodward* the Federal Circuit did not require the Navy to submit empirical evidence supporting its discharge regulation or allow the plaintiff to dispute whether that evidence showed that the Navy's discharge policy actually furthered legitimate military interests. The court instead quoted the Navy's justification for its regulation—which is nearly identical to the justification provided in the Army's regulation—and held that "the Navy's policy on homosexuality is rationally related to a permissible end." 871 F.2d at 1076-1077.

The court of appeals' failure to affirm the dismissal of Pruitt's suit cannot be squared with *Ben-Shalom* or *Woodward*.[1] Nor is there merit to the

[1] Nor do we believe that the court of appeals' decision can be squared with the D.C. Circuit's decision in *Dronenburg* or the Tenth Circuit's decision in *Rich*. But its decision is in conflict with the decisions in *Ben-Shalom* and *Woodward*, even accepting the court of appeals' conclusion that it matters whether the government showed that the service members committed specific homosexual acts. In *Ben-Shalom* the court noted that it was "true that actual lesbian conduct has not been admitted by plaintiff on any particular occasion, and the Army has offered no evidence of such conduct" (881 F.2d

court of appeals' suggestion (Pet. App. 15a n.4) that those cases are called into question by this Court's decisions in *Palmore* v. *Sidoti*, 466 U.S. 429 (1984), and *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), both of which were decided before the Seventh and Federal Circuits issued their decisions. In *Palmore*, the Court declined to accept social disapproval of interracial marriage as a justification for a child custody decision (466 U.S. at 433), while in *City of Cleburne* the Court concluded that the requirement of a special permit for homes for the mentally retarded could not be justified by negative attitudes toward the mentally retarded (473 U.S. at 448). But interracial marriage cannot be prohibited (*Loving* v. *Virginia*, 388 U.S. 1 (1967)), nor could a State make it illegal to act mentally retarded. But nearly half of the States prohibit homosexual sodomy (*Bowers* v. *Hardwick*, 478 U.S. 186, 192 (1986)), a similar criminal statute applies to the military (10 U.S.C. 925), and this Court upheld such criminal statutes in *Bowers* v. *Hardwick*.

In *Woodward*, the Federal Circuit concluded that *Bowers* refuted the proposition that the military's policy with respect to homosexuals was constitutionally infirm. 871 F.2d at 1076. Similarly, in *Ben-Shalom*, the Seventh Circuit stated that "[i]f homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational

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at 464), and in Woodward the court noted that "acts of sodomy have not been expressly admitted" by the plaintiff (871 F.2d at 1074 n.6).

basis scrutiny for equal protection purposes." 881 F.2d at 464. As the Seventh and Federal Circuits concluded, it is *Bowers* that is most relevant to this case, not *Palmore* or *City of Cleburne*. Unlike the Ninth Circuit in this case, the Seventh and Federal Circuits correctly dismissed equal protection challenges to the military's discharge policy.

2. The Ninth Circuit also erred by concluding that the Army's regulations classify on the basis of homosexual status.[2] On its face, the Army's regulation applies to service members "who engage in homosexual *conduct* or who, by their statements, demonstrate a propensity to engage in homosexual *conduct*." AR 135-175, § VII, ¶ 2-37(a) (emphasis added). In this case, Pruitt's acknowledgement that she is a homosexual and that she has gone through two homosexual marriages gave rise, under the regulation (*id.* ¶ 2-39(b) and (c)), to a rebuttable regulatory inference that she had committed, or had a propensity to commit, homosexual acts. That is surely a reasonable presumption.[3] Pruitt was discharged because

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[2] The Ninth Circuit's conclusion that the Army's regulation classifies on the basis of status rather than conduct appears to have been important to each of its other two erroneous subsidiary holdings, as well as to its ultimate conclusion to reverse the dismissal of the complaint. Thus, while concluding that the regulation may not be justified by social disapproval of homosexuality, the court seemed to acknowledge that the military could take into account "disapproval of specific acts of criminal conduct." Pet. App. 14a. The court's holding that the regulation must be judged under a heightened standard of review, despite *Bowers* v. *Hardwick*, was firmly based on its conclusion that *Bowers* "was a case relating to conduct, not orientation." App., *infra*, 17a n.5.

[3] That a person's acknowledgement that she is a homosexual and has been a party to homosexual marriages is a reasonable,

she did not rebut the presumption that she had committed homosexual acts.

The argument that the military's discharge regulations classify solely on the basis of homosexual status was rejected by the Seventh Circuit in *Ben-Shalom*. Unlike the Ninth Circuit, the Seventh Circuit concluded: "Plaintiff's lesbian acknowledgement, if not an admission of its practice, at least can rationally and reasonably be viewed as reliable evidence of a desire and propensity to engage in homosexual conduct. Such an assumption cannot be said to be without individual exceptions, but it is compelling evidence that plaintiff has in the past and is likely to again engage in such conduct." 881 F.2d at 464. Similarly, the Federal Circuit in *Woodward* noted that the plaintiff in that case acknowledged that he "sought the company of 'gay' enlisted men" and "wanted to remain in the Navy 'as an honest, open, "gay" officer,' " but did not admit to having committed any particular homosexual acts. 871 F.2d at 1074 n.6. The court concluded, in light of those statements, that "we need not address the factual situation where there is action based *solely* on 'status as a person with a homosexual orientation.' " *Ibid.*

Significant policy interests are advanced by the rebuttable regulatory inference that a member's admission of homosexuality or homosexual marriages indicates a propensity to commit homosexual acts. The regulatory inference avoids the need to launch an in-

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if not compelling, indicator and predicator of homosexual conduct is hardly a remarkable notion. See, *e.g.*, *High Tech Gays* v. *Defense Industrial Security Clearance Office*, 909 F.2d 375, 377, 380 (9th Cir. 1990) (Canby, J., joined by Norris, J., dissenting from denial of rehearing en banc); *Ben-Shalom*, 881 F.2d at 464; *Woodward*, 871 F.2d at 1074 & n.6.

vestigation to prove the obvious. And because, under the regulation, the Army need not obtain actual evidence of homosexual conduct to discharge a service member, the privacy of members of the Armed Forces is not unnecessarily infringed as a result of potentially instrusive investigations. As the Seventh Circuit stated in *Ben-Shalom* (881 F.2d at 464):

> [The military] need not shut its eyes to the practical realities of [a service member's admission of homosexuality], nor be compelled to engage in the sleuthing of soldiers' personal relationships for evidence of homosexual conduct in order to enforce its ban on homosexual acts.

Under the Ninth Circuit's approach, on the other hand, the Army apparently needs to obtain evidence actually showing that Pruitt, who has twice married other women, has committed homosexual acts.

3. The Ninth Circuit also erred by stating that the military may not take social disapproval of homosexuality into account. Congress authorized the Secretary of the Army to "prescribe physical, mental, *moral*, professional, and age qualifications" for reservists. 10 U.S.C. 510(b), 591(b) (emphasis added). The Secretary, in turn, has concluded that the maintenance of a strong and effective fighting force requires the discharge of members who commit, or demonstrate a propensity to commit, homosexual acts. This policy concededly is grounded in part on society's intolerance of homosexual conduct based on moral precepts recognized by many in our society as legitimate.[4] See *Beller*, 632 F.2d at 811 (Kennedy, J.).

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[4] It is not unreasonable for the military to conclude that requiring heterosexual service members to share shower, toilet, and berthing facilities with persons with a propensity

Contrary to the Ninth Circuit's decision in this case, the Secretary may acknowledge and accommodate long-established, legislatively sanctioned, and judicially acknowledged social mores when prescribing suitability criteria for service members.

That conclusion is mandated by *Bowers* v. *Hardwick*. If States may criminalize homosexual conduct based on society's moral view that such conduct is unacceptable, then the military may consider that moral view when it prescribes suitability criteria for service members. It follows, moreover, that if the military may discharge members who commit homosexual acts, it may also discharge members who, in the Army's judgment, are likely to commit such acts. As the district court indicated in this case (App., *infra*, 24a), the Army need not wait for a service member's self-acknowledged "desire or intent [to commit homosexual acts to] ripen into attempt or actual performance."

Notably, Pruitt does not challenge the validity of 10 U.S.C. 925, which criminalizes sodomy by service members. Nor does she dispute (App., *infra*, 15a) that the Army may discharge service members who

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to commit homosexual acts may be at least as objectionable to heterosexuals as would be the sharing of those facilities with persons of the opposite gender. It bears emphasizing that soldiers may be required to live in confined conditions at remote locations for prolonged periods. Nor is it unreasonable for the military to conclude that, in the absence of its discharge policy, disturbances would result that would tend to jeopardize morale and undermine the mutual trust and confidence that is essential for an effective command structure. Such disturbances would inevitably impair public acceptability of the Armed Forces and, in turn, adversely affect recruitment and retention.

commit homosexual acts. Under these circumstances, it follows that the Army may discharge persons who have committed, or have a propensity to commit, homosexual acts.[5]

The Ninth Circuit's conclusion that the Army's regulation is invalid insofar as it is based on social disapproval of homosexuality is contrary to decisions of other circuits. Both the Federal Circuit in *Woodward* (871 F.2d at 1076) and the D.C. Circuit in *Dronenburg* (741 F.2d at 1398) quoted and approved of the justification provided by the Navy for its similar regulation. Among the justifications listed by the courts were the maintenance of mutual trust and confidence among service members and recruiting and retaining service members, both of which are based in part on the military's recognition of societal disapproval of homosexuality.

4. The court of appeals also erred by holding that the Army's regulation should be reviewed under what

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[5] Common sense and experience support the military's concern that permitting homosexual members to serve may increase the incidence of homosexual relations by and among service members. See, *e.g.*, *Watkins* v. *United States Army*, 837 F.2d 1428 (9th Cir. 1988), vacated, 875 F.2d 699 (9th Cir. 1989) (en banc), cert. denied, 111 S. Ct. 384 (1990) (plaintiff committed homosexual act with service member); *Gay Veterans Ass'n* v. *Secretary of Defense*, 850 F.2d 764 (D.C. Cir. 1988) (same); *Dronenburg* v. *Zech*, 741 F.2d 1388 (D.C. Cir. 1984) (same); *Beller* v. *Middendorf*, 632 F.2d 788 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981) (same); *Berg.* v. *Claytor*, 591 F.2d 849 (D.C. Cir. 1978) (same); *Matlovich* v. *Secretary of the Air Force*, 591 F.2d 852 (D.C. Cir. 1978) (same). Particularly since Congress has criminalized sodomy by military personnel, it is clear that the military may take reasonable steps to minimize the likelihood of such conduct among its members.

it called an "active" rational basis test. While it is not entirely clear what this heightened standard entails, it is evident that the Army must provide more than the justifications for the discharge policy set out in its regulation. Indeed, the court of appeals appears to envision that the Army should provide empirical evidence supporting its regulation and that the plaintiff will be permitted to dispute the relevance of that evidence. App., *infra*, 14a. Such requirements are in marked contrast to this Court's application of rational basis review and are particularly inappropriate for review of military decisions.

As an initial matter, this Court has repeatedly held that, to survive an equal protection challenge, a classification need only *conceivably* further a legitimate governmental interest. *Nordlinger* v. *Hahn*, 112 S. Ct. 2326, 2332 (1992) ("In general, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification."); *Sullivan* v. *Stroop*, 496 U.S. 478, 485 (1990) (a challenged classification that is evaluated under rational basis standard "does not violate the Equal Protection Clause 'if any state of facts reasonably may be conceived to justify it' "). Moreover, there is no need to hypothesize justifications for the Army's discharge policy, since the justifications are set out in the regulation itself. AR 135-175, § VII, ¶ 2-37(a). The Ninth Circuit's contrary holding that the Army must provide additional evidence for the district court to weigh invites the judiciary, based on its evaluation of conflicting documents submitted by competing experts, to second-guess the judgment of military officials as to what categories of persons should be barred from military service in order to promote an effective and disciplined fighting force.

Even if "active" rational basis review were consistent with this Court's equal protection jurisprudence generally, such review would be inappropriate to review military judgments. The Constitution vests the Legislative and Executive Branches with the authority to govern the military, and professional decisions regarding the governance and composition of the military are entitled to review under the most deferential standard. *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973); *Department of the Navy* v. *Egan*, 484 U.S. 518, 527 (1988). In *Goldman* v. *Weinberger*, 475 U.S. 503 (1986), this Court squarely rejected the notion that the military is required to submit empirical evidence to justify its regulations. In that case, the Court held that the Air Force was not required to produce evidence "from actual experience or a scientific study" to support a regulation restricting the wearing of headgear, including yarmulkes. *Id.* at 509. Moreover, the Court held that the service member's expert testimony "that religious exceptions to [the regulation] are desirable is quite beside the point," since "[t]he desirability of dress regulations in the military is decided by the appropriate military officials." *Ibid.*

In *Dronenburg*, the D.C. Circuit correctly applied this Court's decisions in a case involving a challenge to a military discharge regulation. It held that "[t]he Navy is not required to produce social science data or the results of controlled experiments to prove what common sense and common experience demonstrate." 741 F.2d at 1398. The Ninth Circuit's invocation of an "active" rational basis test that calls for some sort of empirical evidence conflicts with that decision.

B. Although the Ninth Circuit remanded this case for further proceedings, review is warranted at this

time. As we have shown, the Ninth Circuit should have affirmed the dismissal of this case, and each of its subsidiary holdings are erroneous. There is no good reason to require the Army to go forward with this case under the faulty approach dictated by the Ninth Circuit.

Moreover, review is desirable at this time to avoid the unwarranted interference with the military chain of command that would result from proceedings on remand. In *United States* v. *Stanley*, 483 U.S. 669, 682-683 (1987), the Court recognized that "the prospect of compelled depositions and trial testimony by military officers concerning the details of their military commands * * * [would] disrupt the military regime." Since the Ninth Circuit's decision apparently calls for testimony by Army officers justifying the discharge regulation, just such disruption would occur on remand.[6]

In addition, a number of other cases are pending in the lower courts that involve challenges to the military's discharge policy.[7] Prior to the decision in this case, it appeared to be clear that such actions had no basis. Absent prompt correction by this Court, how-

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[6] On the basis of the decision in this case, the plaintiff in *Dahl* v. *Garrett*, No. S-89-0351-MLS (E.D. Cal.), has sought to depose Secretary of Defense Cheney, General Colin Powell, and Assistant Secretary of Defense Pete Williams.

[7] *E.g.*, *Jackson* v. *United States*, No. C-90-20680-WAI (N.D. Cal. Dec. 4, 1991), appeal pending, No. 92-15219 (9th Cir.) (Air Force officer discharged); *Cammermeyer* v. *Cheney*, No. C-92-942Z (W.D. Wash.) (National Guard officer discharged); *Dahl* v. *Garrett*, No. S-89-0351-MLS (E.D. Cal.) (Navy member discharged); *Steffan* v. *Cheney*, 780 F. Supp. 1 (D.D.C. 1991), appeal pending, No. 91-5409 (D.C. Cir.) (Naval midshipman discharged).

ever, it seems predictable that the court of appeals' decision will provoke more challenges and will complicate resolution of the resulting cases, as well as those that are currently pending.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1992

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CA No. 87-5914

D.C. No. CV 83-2035 WPG

DUSTY PRUITT, Captain, U.S.A.R.,
PLAINTIFF-APPELLANT

-*v*-

RICHARD CHENEY,* Secretary of Defense; MICHAEL P.W. STONE,** Secretary of the Army; RONALD W. ZELTMAN, Brigadier General, Commanding Officer U.S. Army Reserve Components Personnel and Administration Center, St. Louis, Missouri, DEFENDANTS-APPELLEES

ORDER

Filed: May 8, 1992

Before: FLETCHER, CANBY and O'SCANNLAIN, Circuit Judges.

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* Richard Cheney has been substituted for Caspar Weinberger, Fed. R. App. P. 43(c).

** Michael P.W. Stone has been substituted for John O. Marsh, Jr., Fed. R. App. P. 43(c).

The panel has voted unanimously to amend the opinion previously issued in this case. The amended opinion is attached and is ordered filed.

With that amendment, the panel has voted to deny the petition for rehearing and suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and of the proposed amendment to the opinion, and no judge of the court has requested a vote to rehear the matter en banc.

The petition for rehearing is hereby denied and the suggestion for rehearing en banc is rejected.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA No. 87-5914

D.C. No. CV 83-2035 WPG

DUSTY PRUITT, Captain, U.S.A.R.,
PLAINTIFF-APPELLANT

-v-

RICHARD CHENEY,* Secretary of Defense; MICHAEL P.W. STONE,** Secretary of the Army; RONALD W. ZELTMAN, Brigadier General, Commanding Officer U.S. Army Reserve Components Personnel and Administration Center, St. Louis, Missouri, DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the Central District of California
William P. Gray, District Judge, Presiding

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* Richard Cheney has been substituted for Caspar Weinberger, Fed. R. App. P. 43(c).

** Michael P.W. Stone has been substituted for John O. Marsh, Jr., Fed. R. App. P. 43(c).

Argued and Submitted August 5, 1988
Pasadena, California
Filed: August 19, 1991
Amended Opinion Filed: May 8, 1992

AMENDED OPINION

Before: FLETCHER, CANBY and O'SCANNLAIN, Circuit Judges.

CANBY, Circuit Judge:

Appellant, Reverend Dusty Pruitt, appeals from the district court's dismissal, pursuant to Fed. R. Civ. P. 12(b)(6), of her first and fifth amendment challenges to Army regulations requiring her discharge from the U.S. Army Reserve (USAR) because of her acknowledged homosexuality. We affirm in part and reverse in part.

BACKGROUND

The facts of this case are not in dispute. Reverend Pruitt served in the U.S. Army between January 1971 and July 1975, ultimately rising to the rank of Captain. After leaving active service to seek ordination as a methodist minister, Pruitt remained an officer in the U.S. Army Reserve (USAR). On May 25, 1982, Pruitt was notified of her selection for promotion to the rank of Major effective February 6, 1983. Pruitt's outstanding record in both active and reserve service is undisputed.

On January 27, 1983, the Los Angeles Times published an interview with Pruitt which revealed that

she was a lesbian and had twice gone through ceremonies of marriage to other women. The article focused on Pruitt's struggle to resolve personal contradictions between her religion and military career, and her sexuality. Through this article the Army first learned of Pruitt's homosexuality. On the basis of this information, the Army suspended Pruitt's promotion to Major pending an investigation to determine whether Pruitt should be separated from the Army Reserve pursuant to AR 135-175, which mandates the discharge of homosexual servicemembers.

On April 4, 1983, Pruitt filed this action in district court.

In her complaint, Pruitt declared that she was homosexual. She alleged, however, that the Army was barred by the first amendment from discharging her solely on the basis of her admission of homosexuality.[1] The district court denied the Army's motion to dismiss without prejudice and stayed the action pending completion by the Army of its administrative investigation.

On April 17, 1984, the Army advised Pruitt of its intention to revoke her security clearance on the ground that "substantial evidence of record [supports the conclusion] that you are a practicing homosexual (lesbian) as defined by paragraph 2-38, AR 135-175."[2] Pruitt responded on May 16, 1984 by letter to the Army contesting the proposed revocation

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[1] Pruitt also alleged that her discharge violated Fifth Amendment due process because the Army was violating its own regulations. Pruitt no longer pursues this claim.

[2] "Homosexual means a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts." AR 135-175, VII, 2-38(a).

of her clearance. In the letter, Pruitt again admitted her homosexuality:

> I am a homosexual. I do not believe that as a homosexual woman, I am a security risk; therefore, I cannot see what the matter of my being a homosexual has to do with my security clearance. . . .

Although the record is clear that Pruitt is homosexual, there is no evidence in this case that she engaged in homosexual acts, or made any advance toward any active or reserve soldier that might be construed as homosexual conduct.

An Army Administrative Board ("Board") convened on September 7, 1985 to determine whether sufficient evidence supported the conclusion that Pruitt was homosexual. The Board accepted into evidence the following: Pruitt's Complaint for Declaratory Relief filed April 4, 1983 (in which she declared she was homosexual); the Los Angeles Times article; the letter of May 16, 1984 in which Pruitt explicitly informed the Army of her homosexuality; and Pruitt's military record. Pruitt attended the proceeding and was represented by legal counsel, but she refused to testify before the board. She made no effort to challenge the veracity of the newspaper articles, or to explain what she meant when she identified herself as homosexual. The Board concluded that Pruitt was a homosexual within the meaning of AR 135-175, and recommended that she be honorably discharged.[3]

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[3] The Army's criteria for determining when a servicemember will be separated for homosexuality are set forth in AR 135-175, which provides:

The Board's recommendation was accepted by the review authority of the Department of the Army and Pruitt received an honorable discharge on July 9, 1986.

2-39 Criteria. The basis for separation may include pre-service, prior service, or current service conduct or statements. A member shall be separated under the provisions of this section if one or more of the following approved findings is made:

a. The member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are approved further findings that:

(1) Such conduct is a departure from the member's usual and customary behavior.

(2) Such conduct under all circumstances is unlikely to recur because it was solely the result of immaturity, intoxication, coercion, or a desire to avoid military service.

(3) Such conduct was not accomplished by use of force, coercion, or intimidation by the member during a period of military service.

(4) Under the particular circumstances of the case, the member's continued presence in the service as an officer of the Army is consistent with the interest of the Army in proper discipline, good order, and morale; and

(5) the member does not desire to engage in or intend to engage in homosexual acts.

b. The member has stated that he/she is a homosexual or bisexual unless there is a further finding that the member is not a homosexual or bisexual.

c. The member has married or attempted to marry a person known to be of the same biological sex (as evidenced by the external anatomy of the persons involved) unless there are further findings that the

Upon learning of the discharge, Pruitt renoticed her motion for summary judgment, and the Army responded by renewing its motion to dismiss. The district court denied Pruitt's motion for summary judgment, and granted the Army's motion to dismiss, stating that the Army's determination that homosexual personnel are incompatible with its military mission is entitled to substantial deference. This appeal followed.

We withdrew this case from submission pending the en banc decision of this court in *Watkins* v. *United States Army*, 875 F.2d 699 (9th Cir. 1989), *cert. denied*, 111 U.S. 384 (1990), a case raising an equal protection challenge to regulations similar to those challenged by Pruitt. *Watkins* was decided on May 3, 1989. The *Watkins* en banc court, however, did not reach the equal protection issue, instead deciding the case on estoppel grounds. Because the facts of this case do not support an estoppel argument, the *Watkins* opinion has little impact on this decision. We resubmitted this case and now address Pruitt's constitutional claims. We have jurisdiction over this appeal under 28 U.S.C. 1291.

STANDARD OF REVIEW

The district court's denial of Pruitt's motion for summary judgment and granting of the Army's motion to dismiss present questions of law which we review de novo. See *Darring* v. *Kincheloe*, 783 F.2d

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member is not a homosexual or bisexual (e.g., where the purpose of the marriage or attempt to marry was the avoidance or termination of military service).

874, 876 (9th Cir. 1986) (summary judgment); *Mack* v. *South Bay Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986) (dismissal).

DISCUSSION

I. *First Amendment Claim*

Pruitt characterizes her involuntary discharge as a violation of her rights to free speech guaranteed by the first amendment.

She concedes that the Army legitimately may proscribe homosexual conduct in the military context. Nevertheless, because there is no allegation that she engaged in homosexual activity while on duty or performed inadequately as an officer, she contends that her discharge was based on protected expression—her public assertions of her sexuality recorded in the Los Angeles Times article.

Under the Army's regulation, a member may be discharged for stating that he or she is homosexual even absent proof of homosexual conduct, AR 135-175, ¶ 2-39. Pruitt argues that this regulation is facially invalid because it inhibits pure speech, infringes on the right to receive information, and is not necessary to promote the military's interests. Alternatively, Pruitt argues that AR 135-175 is unconstitutional as applied in her case.

Because the allegations of the complaint establish that Pruitt was not discharged for her speech, a threshold requirement for implicating the first amendment, we reject these arguments. See *Johnson* v. *Orr*, 617 F. Supp. 170, 172, 174 (E.D. Cal. 1985) (describing as "specious" a first amendment claim similar to that raised by Pruitt) *aff'd mem.*, 787 F.2d

597 (9th Cir. 1986). Pruitt argues that her statements about her sexual orientation constituted political speech, touching on a matter of public concern. It is true that the substance of the Los Angeles Times article was protected speech. Nevertheless, Pruitt was discharged not for the content of her speech, but for being a homosexual. Addressing this issue in a virtually identical case, the Seventh Circuit recently said:

> [Appellant] is free under the regulation to say anything she pleases about homosexuality and about the Army's policy toward homosexuality. She is free to advocate that the Army change its stance; she is free to know and talk to homosexuals if she wishes. What [appellant] cannot do, and remain in the Army, is to declare herself to be a homosexual. Although that is, in some sense speech, it is also an act of identification. And it is the identity that makes her ineligible for military service, not the speaking of it aloud.

Ben-Shalom v. *Marsh*, 881 F.2d 454, 462 (7th Cir. 1989) (emphasis in original), *cert. denied*, 110 S.Ct. 1296 (1990).

This language applies equally well here. A central problem underlying Pruitt's first amendment argument is that it is based, understandably enough, on the classical dichotomy between the punishment of speech and the punishment of conduct. Because she was not discharged for her conduct, Pruitt concludes that she was discharged for her speech. The Army, however, is not discharging members just for homosexual conduct, or even primarily for homosexual conduct. It is discharging members because of their

status as homosexuals. The pertinent portion of the regulation is entitled "Separation for Homosexuality." A homosexual is defined not only as a person who commits homosexual acts, but as one who "desires to engage" in them. AR 135-175, ¶ 2-38a. An officer who engages in a homosexual act may be spared from separation if several facts are found, including the fact that "[s]uch conduct is a departure from the member's usual and customary behavior," and that "[t]he member does not desire to engage in or intend to engage in homosexual acts." *Id.* at ¶ 2-39a(1), (5). In short, an officer who commits a homosexual act can remain in the service if he or she is not a homosexual, but must be separated if he or she is homosexual. See *Watkins*, 875 F.2d at 712-716 (concurring opinion) (Army's reenlistment ban based on homosexual orientation, not conduct).

The Army did not discharge Pruitt because she spoke candidly about her sexuality to a newspaper. Nor did it discharge her for publicly expressing her views on a timely and controversial subject, or for demonstrating compassion for and association with homosexuals. The Army discharged Pruitt because she admitted to being homosexual, and AR 135-175, ¶¶ 2-39 through 2-44, require separation of homosexual officers from the armed forces. That it was her homosexuality, and not her speech, that caused Pruitt to be discharged is apparent from the subsection of the regulation under which she was discharged. It provides for separation of a member who "has stated that he/she is a homosexual or bisexual *unless there is a further finding that the member is not a homosexual or bisexual.*" AR 135-175, ¶ 2-39b (emphasis added). Pruitt's admission, like most admissions, was

made in speech, but that does not mean that the first amendment precludes the use of the admission as evidence of the facts admitted. See *High Tech Gays* v. *Defense Indus. Security Clearance Office*, 895 F.2d 563, 578-80 (9th Cir. 1990). Pruitt admitted homosexuality and was discharged for it. The question is not whether the Army is free to discharge her for her speech, because it did not do so. The question is whether the Army is entitled to discharge her for her homosexuality—an issue not encompassed by Pruitt's first amendment claim.

II. *Equal Protection Claim*

Although Pruitt's complaint contained general allegations that the regulation requiring her discharge was unconstitutional, she did not articulate an equal protection claim. Pruitt's complaint, however, and the entire action were dismissed under Fed. R. Civ. P. 12(b)(6), for failure to state a claim. "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957) (footnote omitted). Even more to the point, "[a] party does not need to plead specific legal theories in the complaint, as long as the opposing party receives notice as to what is at issue in the lawsuit." *Electrical Constr. & Maint. Co.* v. *Maeda Pacific Corp.*, 764 F.2d 619, 622 (9th Cir. 1985); accord *McCalden* v. *California Library Ass'n*, 919 F.2d 538, 546 (9th Cir. 1990). "The complaint should not be dismissed merely because plaintiff's allegations do not support the legal theory he intends to proceed on, since the court is under a duty to examine

the complaint to determine if the allegations provide for relief on any possible theory." 5A C. Wright & A. Miller, *Federal Practice and Procedure* 1357, at 336-37 (1990). Pruitt's complaint included allegations that the Army was discharging her because of her status as a homosexual. She alleged, for example, that "the defendants do systematically remove homosexuals who are similarly situated to the plaintiff from the Armed Services of the United States and the United States Army on the basis of thoughts, speech and status." Complaint, ¶ 21. These and the other facts pleaded by Pruitt are sufficient, in our view, to state an equal protection claim. At the minimum, they give notice that Pruitt could easily amend to state an equal protection claim—an opportunity she was not afforded.

Although the equal protection issue was not articulated in the complaint, it has been argued on appeal. The Army does not contend that Pruitt has failed to allege that she was discriminated against because of her homosexuality. Instead, the Army argues that its right to discharge homosexual servicepersons is so firmly supported in the law that any equal protection claim that Pruitt has asserted or might assert is legally insufficient on its face.

The Army first relies on *Beller* v. *Middendorf*, 632 F.2d 788 (9th Cir. 1980), *cert. denied*, 452 U.S. 905, 454 U.S. 855 (1981), in which we upheld the discharge from the Navy of three enlisted persons who had engaged in homosexual acts. In analyzing the Navy's actions under a due process standard, we held that there were several grounds on which the regulation could be upheld: "The Navy can act to protect the fabric of military life, to preserve the integrity of

the recruiting process, to maintain the discipline of personnel in active service, and to insure the acceptance of men and women in the military, who are sometimes stationed in foreign countries with cultures different from our own." Id. at 811.

Beller, however, is distinguishable in three respects, and its holding is weakened in a fourth. First, the servicepersons in that case were discharged for homosexual conduct, not homosexual status. Pruitt does not dispute that the Army can discharge members for at least certain kinds of homosexual conduct, but she alleges that she was discharged for her status, with no evidence of conduct. Second, *Beller* was an appeal from several summary judgments. The Navy had submitted evidence to support the due process underpinnings of its regulation. Here the case was dismissed on motion; the Army has submitted no evidence justifying its regulation, and Pruitt has had no opportunity to dispute that evidence. Third, and most important, *Beller* was a substantive due process case. It did not deal with discrimination as such, or with the requisite level of justification for discrimination. That fact is significant in light of the later decision in *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), discussed below.

Finally, one of the justifications offered by the Navy in *Beller* was the tension "between known homosexuals and other members who 'despise/detest homosexuality.'" *Beller*, 632 F.2d at 811. To the degree that *Beller* may thus have rested on prejudice of others against homosexuals themselves, rather than on disapproval of specific acts of criminal conduct, its reasoning is undercut by *Palmore* v. *Sidoti*, 466 U.S. 429, 104 S. Ct. 1879, 80 L. Ed. 421 (1984). In *Pal-*

more, the Supreme Court struck down a denial of custody of a child based on social disapproval of the interracial marriage of her mother. In so ruling, the Court said: "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." Id. at 433, 104 S.Ct. at 1882. *Cleburne* made clear that this principle is not confined to instances of racial discrimination reviewed under strict scrutiny. Cleburne, 473 U.S. at 448, 105 S.Ct. at 3258. This justification accepted in *Beller*, therefore, should not be given unexamined effect today as a matter of law.[4]

The next case upon which the government principally relies is *High Tech Gays* v. *Defense Indus. Se-*

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[4] Similar weaknesses inhere in *Hatheway* v. *Secretary of the Army*, 641 F.2d 1376 (9th Cir.), *cert. denied*, 454 U.S. 864 (1981). *Hatheway* was a case based on conduct alone; Hatheway attacked his court-martial conviction for sodomy on the ground that homosexual sodomy was prosecuted while heterosexual sodomy was not. In rejecting the equal protection argument. Hatheway relied on the same justifications accepted in *Beller*, including those arising from prejudice of other servicemembers or potential recruits against homosexuals. *Hatheway*, like *Beller*, preceded the Supreme Court's decisions in *Palmore* and *Cleburne*.

Much the same may be said of other cases cited by the Army that rely on *Beller* to support the rationality of blanket discrimination by the armed forces against homosexuals. *See Dronenburg* v. *Zech*, 741 F.2d 1388 (D.C. 1984); *Rich* v. *Secretary of the Army*, 735 F.2d 1220 (10th Cir. 1984). These cases involved homosexual conduct, and essentially adopted *Beller* in finding the discrimination justified. *Beller* was also followed in *Woodward* v. *United States*, 871 F.2d 1068 (Fed. Cir. 1989), *cert. denied*, 110 S. Ct. 1295 (1990); although it was decided after *Palmore* and *Cleburne*, *Woodward* did not consider the possible effect of those cases on *Beller's* analysis.

curity Clearance Office, 895 F.2d 563 (9th Cir. 1990), upon which we requested and received supplemental briefing from the parties. In *High Tech Gays*, homosexual defense workers brought an equal protection challenge to the practice of the Department of Defense of routinely subjecting homosexuals to expanded investigations and adjudications prior to granting them security clearances. We rejected the contention that a classification of homosexuals was entitled to strict scrutiny, and instead required that the Department of Defense policy have a rational basis. *Id.* at 571-74. We then found that the Department's policy had a rational basis because foreign intelligence agencies had been shown to target homosexuals as potentially vulnerable to compromise. *Id.* at 576.

High Tech Gays will not, however, do the service the government asks of it. It is true that we found the discrimination against homosexuals in that case to have a rational basis, but it is clear that we applied the type of "active" rational basis review employed by the Supreme Court in *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432 (1985). In *Cleburne*, the Supreme Court held that the City had failed to show a rational basis for its requirement that homes for the mentally retarded obtain a special permit, when other care and multiple-dwelling facilities needed no such permit. Relying on *Palmore*, the Court specifically rejected the legitimacy of relying on opposition to the home by neighbors. "[M]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like." *Id.* at

448. The Court observed that "this record does not clarify how, in this connection, the characteristics of the intended occupants of the Featherston home rationally justify denying to those occupants what would be permitted to groups occupying the same site for different purposes." *Id.* at 450.

In *High Tech Gays*, we relied on *Cleburne* and performed the same type of review to see whether the government had established on the record a rational basis for the challenged discrimination.[5] The government submitted, and we reviewed declarations of officials that explained the practice of foreign intelligence agencies (notably the KGB) to target homosexuals. *High Tech Gays*, 895 F.2d at 576-77. The declarations referred to and incorporated expert testimony to the same effect. *Id.* Finally, we rejected as insufficient the plaintiffs' affidavits attempting to establish that the KGB's policy of targeting homosexuals was irrational; we ruled that the Department was entitled to take the KGB's practices into account even if they were irrational. *Id.* at 578.

It is clear, then, that in *High Tech Gays*, upon plaintiffs' showing of discrimination, we required

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[5] It should be noted that in *High Tech Gays*, we engaged in active rational basis review despite our conclusion that *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), militated against a higher level of scrutiny. *High Tech Gays*, 895 F.2d at 573 n.9. *Hardwick* had ruled that homosexuals could not rely on a right of privacy to exempt them from criminal laws proscribing sodomy. In relying partly on *Hardwick* to negate a higher standard of equal protection review, we noted that *Hardwick*, like *High Tech Gays*, was a case relating to conduct, not orientation. *Id.* *Hardwick* is therefore even less of a barrier to active rational basis review in this case than it was in *High Tech Gays*.

the government to establish on the record that its policy had a rational basis. The Supreme Court imposed the same requirement in *Cleburne*. Neither case supports the contention of the Army here that its far more rigid discrimination against homosexuals should be held to be rational as a matter of law, without any justification in the record at all. We have before us only a complaint that has been dismissed for failure to state a claim. After *Palmore*, *Cleburne* and *High Tech Gays*, we cannot say that the complaint is insufficient on its face. Assuming that Pruitt supports her allegations with evidence, we will not spare the Army the task, which those cases imposed, of offering a rational basis for its regulation, nor will we deprive Pruitt of the opportunity to contest that basis.

III. *Deference to the Military*

Finally, the Army urges that we should defer to the military judgment. We readily acknowledge, as we must, that military decisions by the Army are not lightly to be overruled by the judiciary. *See, e.g.*, *Rostker* v. *Goldberg*, 453 U.S. 57, 64-68 (1981); *Goldman* v. *Weinberger*, 475 U.S. 503, 507 (1986). That admonition, however, is best applied in the process of judging whether the reasons put forth on the record for the Army's discrimination against Pruitt are rationally related to any of the Army's permissible goals. We have no doubt that the district court will remain aware of the proper respective roles of the military and the judiciary in entertaining further proceedings in this case.

If we now deferred, on this appeal, to the military judgment by affirming the dismissal of the action in

the absence of any supporting factual record, we would come close to denying reviewability at all. While we have acknowledged that there are some internal military matters that are totally exempt from judicial review, we have also identified many that are reviewable. *See Wallace* v. *Chappell*, 661 F.2d 729, 733 n.4 (9th Cir. 1981), *rev'd on other grounds*, 462 U.S. 296 (1983). In *Wallace*, we adopted the test of *Mindes* v. *Seaman*, 453 F.2d 197 (5th Cir. 1971),[6] to determine the reviewability of military decisions. The Army does not argue—and the district court did not hold—that the *Mindes* test precludes review here. Indeed, the validity of a regulation similar to the one before us was reviewed in *Beller*. The Army does not ask us to deny review; it asks us to uphold its regulation without a record to support its rational basis. This we decline to do.

IV. *Conclusion*

Pruitt failed to state a first amendment claim; the district court did not err in denying her motion for summary judgment. The district court erred, however, in dismissing Pruitt's action on the ground that her complaint failed to state a claim for relief. Her complaint alleges facts sufficient to state an equal

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[6] *Mindes* established two threshold requirements for review: the plaintiff must (1) allege a violation of the Constitution, a federal statute, or military regulations and (2) exhaust intraservice remedies. If those requirements are met, reviewability depends on a weighing of four factors: (1) the nature and strength of the plaintiff's claim; (2) the potential injury to plaintiff if review is refused; (3) the extent of interference with military functions; (4) the extent to which military discretion or expertise is involved. *Mindes*, 453 F.2d at 201-02.

protection claim. We reverse the judgment of dismissal, and remand for further appropriate proceedings, including those directed toward determining whether the Army's discrimination is rationally related to a permissible governmental purpose.

Pruitt is entitled to her costs on this appeal.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX C

UNITED STATES DISTRICT COURT
C.D. CALIFORNIA

No. CV 83-2035-WPG

REV. DUSTY PRUITT, Captain, U.S.A.R., ET AL.,
PLAINTIFFS

v.

CASPAR WEINBERGER, Secretary of Defense, ET AL.,
DEFENDANTS

April 17, 1987

MEMORANDUM OF DECISION

GRAY, District Judge.

The plaintiff was a captain in the United States Army Reserve until she was discharged, on July 19, 1986, on the ground that she was a homosexual. She filed this action seeking declaratory relief adjudging that Army Regulation 135-175 ("AR 135-175"), upon which her discharge was based, is unconstitutional because it violates the First Amendment, both facially and as applied to the plaintiff and to her right to privacy.

Since the filing of this action, the plaintiff has adequately exhausted her administrative remedies and

now moves for summary judgment; the defendant has countered with a motion to dismiss the action; and both motions have been submitted to the Court for decision. The plaintiff's motion will be denied and the Motion to Dismiss granted.

Factual Background

On January 27, 1983, the plaintiff was the subject of an article published in the Los Angeles Times entitled *Pastor Resolves Gay, God Conflict*, which described her as a "lesbian and the pastor of a nondenominational Christian church . . . whose congregation is 85% gay and lesbian." The article also reports that the plaintiff had twice gone through a marriage ceremony for homosexuals. As a result of the article, an investigation was initiated by the Army to determine whether or not it should suspend the plaintiff's scheduled promotion to major, revoke her security clearance, and ultimately remove her from the Army Reserve pursuant to AR 135-175. That regulation provides for separation of a member who has engaged in homosexual acts, has admitted that she is a homosexual as defined in the regulation, or has married or attempted to marry a person of the same sex. AR 135-175, § VII, ¶ 2-39. The regulation defines a homosexual as "a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts." AR 135-175, § VII, ¶ 2-38(a).

A formal hearing was conducted by an administrative board on September 7, 1985. The board concluded that separation was warranted based on an admission the plaintiff made in a letter to her commanding officer, wherein she acknowledged that she is a homo-

sexual within the meaning of the subject regulation (Findings of Board of Officers, Summarized Proceedings of Officer Elimination Action, dated Sept. 7, 1985, at page 3). The board's recommendation was approved by the Commander, Sixth Army, and accepted by the review authority at the Department of the Army level. Ms. Pruitt was honorably discharged from the reserve, effective July 19, 1986.

Discussion

The constitutionality of the discharge of a member of the Armed Forces because of *acts* of homosexuality has been upheld in *Beller v. Middendorf*, 632 F.2d 788 (9th Cir.1980). However, there is no showing that the present plaintiff has committed any such acts. Instead, her discharge stemmed from her acknowledgement that she is a homosexual, as defined in the subject regulation. This means that she "desires to engage in, or intends to engage in, homosexual acts." The plaintiff contends that this portion of the regulation is violative of the First Amendment because it calls for punishment solely on the basis of her assertion of her status rather than because of any conduct in which she engaged. I am unable to accept such an argument.

AR 135-175 sets out the policy under which the Army discharges homosexuals, as follows:

> Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission. The presence of such members ad-

> versely affects the ability of the armed forces to maintain discipline, good order, and morale; to foster mutual trust and confidence among members; to insure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of members who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of Armed Forces; to maintain the public acceptability of military service; and to prevent breaches of security." AR 135-175, § VII, ¶ 2-37(a).

In light of such policy, it makes little difference whether a person has committed homosexual acts, or would like to do so, or intends so to do. A person in one of the last two categories could reasonably be deemed to be just as incompatible with military service as one who engages in homosexual acts. Certainly, the morale factor could reasonably be considered to be the same, and the Army understandably would be apprehensive of the prospect that desire or intent would ripen into attempt or actual performance. The acknowledgement by the plaintiff that she is a homosexual is simply an admission that she comes within a classification of people whose presence in the Army is deemed by the Army to be incompatible with its above expressed goals.

It is not for this Court to assess the wisdom of the Army's policy here concerned. There is much to be said for the view expressed by Judge Terence T. Evans in *benShalom v. Secretary of Army*, 489 F. Supp. 964, 976 (E.D.Wis.1980):

> "The peculiar nature of Army life has always required the melding together of disparate per-

> sonalities. For much of our history, the military's fear of racial tension kept black soldiers segregated from whites. Fear of sexual tensions, until very recently, kept the participation of female soldiers to a minimum. The vital mission of the Army has withstood these changes in racial and heterosexual standards. It should be able to similarly withstand any changes necessary to live without the regulation found to be offensive by the court."

However, the regulation held invalid in that case was much broader than the one here concerned, in that even a person that "evidences homosexual . . . interest" could be, without more, subjected to discharge.

Judgment will be entered denying relief to the plaintiff and ordering the dismissal of the action.

APPENDIX D

Section VII of Army Regulation 135-175 ("Separation for Homosexuality") provides, in pertinent part:

2-37. Policy. *a.* Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission. The presence of such members adversely affects the ability of the armed forces to maintain discipline, good order, and morale; to foster mutual trust and confidence among members; to insure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of members who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of Armed Forces; to maintain the public acceptability of military service; and to prevent breaches of security.

b. Nothing in this section precludes separation in appropriate circumstances for another reason.

c. The provisions of this section do not preclude trial by court-martial in appropriate cases.

2-38. Definitions. For the purpose of this section the following apply:

a. Homosexual means a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts.

b. Bisexual means a person who engages in, desires to engage in, or intends to engage in homosexual and heterosexual acts.

c. A homosexual act means bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires.

2-39. Criteria. The basis for separation may include preservice, prior service, or current service conduct or statements. A member shall be separated under the provisions of this section if one or more of the following approved findings is made:

a. The member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are approved further findings that:

(1) Such conduct is a departure from the member's usual and customary behavior.

(2) Such conduct under all circumstances is unlikely to recur because it was solely the result of immaturity, intoxication, coercion, or a desire to avoid military service.

(3) Such conduct was not accomplished by use of force, coercion, or intimidation by the member during a period of military service.

(4) Under the particular circumstances of the case, the member's continued presence in the service as an officer of the Army is consistent with the interest of the Army in proper discipline, good order, and morale; and

(5) The member does not desire to engage in or intend to engage in homosexual acts.

b. The member has stated that he/she is a homosexual or bisexual unless there is a further finding that the member is not a homosexual or bisexual.

c. The member has married or attempted to marry a person known to be of the same biological sex (as

evidence [*sic*] by the external anatomy of the persons involved) unless there are further findings that the member is not a homosexual or bisexual (e.g., where the purpose of the marriage or attempt to marry was the avoidance or termination of military service).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 60004

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No. 92-389

Supreme Court, U.S.
FILED
NOV 9 1992
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

RICHARD CHENEY, Secretary of Defense, et al.,
Petitioners,

vs.

DUSTY PRUITT,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred in concluding that Respondent's equal protection claim should be remanded to the district court for further appropriate proceedings under the rational basis test and not dismissed for failure to state a claim.

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No. 92-389

In the Supreme Court of the United States

October Term, 1992

Richard Cheney, Secretary of Defense, et al., Petitioners,

v.

Dusty Pruitt, Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Dusty Pruitt submits this brief in opposition to the petition for a writ of certiorari in this case.

STATEMENT OF THE CASE

Respondent Dusty Pruitt served on active duty in the United States Army from January 6, 1971, until February 1976, ultimately rising to the rank of Captain. Excerpts of Record ("ER") 276. She spent most of her active duty career as a military recruiter, where she was commended for "her extraordinary leadership ability," ER 244, "her cooperative and positive attitude," ER 280, and her "initiative, determination, and tireless efforts." ER 244. She was also described as "an outstanding young officer with unlimited potential for advancement," ER 278, and she received perfect scores on several evaluations by her superiors. *E.g.*, ER 278, 280.

Respondent left active duty in 1976 to seek ordination as a minister and entered the Army Reserve. ER 274, 276. In 1979, she began service as an instructor at the Nuclear, Biological, and Chemical School. During her tenure in this position, she was described as "an officer who sets and maintains the highest standards of moral conduct both on and off duty." ER 269. After her final assignment at this school, her superiors stated that "she displayed the highest degree of self-discipline and is completely reliable. Her can-do attitude, professionalism, dedication, selflessness, and enthusiasm show that she has unlimited potential." ER 267. As the court of appeals commented, "Pruitt's outstanding record in both active and reserve service is undisputed." Petition, App. 4a.

On May 25, 1982, Respondent was notified of her selection for promotion to Major, effective February 6, 1983. ER 10. The promotion never took place; it was rescinded following the publication in the Los Angeles Times on January 27, 1983 of an interview with Respondent in her civilian capacity as pastor of the Metropolitan Community Church. ER 12-13. Entitled "Pastor Resolves Gay, God Conflict: Church Works to Heal Homosexual's Religious Scars," the article focused on Respondent's personal struggle with her sexuality and her Baptist

upbringing, her ministry, and her Army career. In the article, she identified herself as a lesbian.

In a letter dated February 7, 1983, Respondent was informed that her pending promotion to Major had been suspended, and that an investigation alleging "Moral/Professional Dereliction" under Army Regulation 135-175 had been commenced. ER 15. On April 4, 1983, Respondent filed a verified complaint in federal district court challenging the withdrawal of her promotion and her threatened discharge. ER 1. In June 1983, Petitioners filed a motion to dismiss Respondent's complaint. The district court denied this motion without prejudice to renewing it once the Army had decided whether or not to discharge Respondent. ER 129-37.

The Army's investigation took more than two years. During the course of the investigation, in response to a letter advising Respondent that her security clearance would be revoked, Respondent protested the withdrawal of her security clearance, stating:

> "I am a homosexual. I do not believe that as a homosexual woman, I am a security risk; therefore, I cannot see what the matter of my being a homosexual has to do with my security clearance. . . ."

ER 178. The investigation found no evidence that Respondent had committed a homosexual act. Petition, App. 6a ("there is no evidence in this case that [Respondent] engaged in homosexual acts, or made any advance toward any active or reserve soldier that might be construed as homosexual conduct").

Finally, on September 7, 1985, an Army Reserve Elimination Board convened a hearing to determine Respondent's suitability for retention. The Army introduced only two exhibits: 1) the verified complaint, including the Los Angeles Times article; and 2) Respondent's May 16, 1984 letter protesting the withdrawal of her security clearance. ER 223-25. Respondent introduced her military record described above. After deliberation, the Board issued the following findings:

1. That Captain Pruitt stated she was a homosexual as evidenced by [the May 16th letter].
2. That the criteria of Paragraph 2-39 of AR 135-175 have been met and discharge is warranted.
3. That there is no evidence to indicate [Captain] Pruitt's service should be characterized as other than Honorable.
4. That [Captain] Pruitt's argument as to the constitutionality of the regulation are outside the scope of this Board's authority.

ER 225.[1]

Consequently, the Board recommended that Respondent be eliminated from the Army Reserve with an honorable discharge. This recommendation was forwarded to the Secretary of the Army for review. On February 12, 1986, still awaiting the decision of the Secretary, Respondent filed a motion for summary judgment seeking a declaration that the Army's regulation was unconstitutional because it required her discharge solely on the basis of her assertion of her status as a lesbian rather than because of any conduct in which she engaged. At oral argument of the motion, the district court stated its intent to await a final decision by the Secretary before ruling on the motion. ER 305-23.

On July 9, 1986, the Secretary issued an order discharging Respondent. ER 333. Petitioners thereafter renewed their motion to dismiss, which the district court granted on April 7, 1987. Petition, App. 21a. The court also denied Respondent's pending motion for summary judgment. Petition, App. 22a. In dismissing Respondent's complaint without leave to amend, the

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[1]Petitioners misrepresent these findings and claim that the Board recommended discharge based on Respondent's statement in the Los Angeles Times article about her participation in two church commitment ceremonies. Petition at 3. The findings of the Board show that the ceremonies were *not* the basis for her discharge. ER 224-25. *See also* Petition, App. 22a-23a.

court ruled that her statement that she is a lesbian was "simply an admission that she comes within a classification of people whose presence in the Army is deemed by the Army to be incompatible with its . . . expressed goals." Petition, App. 24a.

On appeal, Respondent argued that the regulation, both on its face and as applied, violated her First Amendment right to identify herself as a lesbian and her Fifth Amendment right to equal protection of the law. The court of appeals issued its unanimous decision on August 19, 1991. The court rejected Respondent's claim that the regulation violated her First Amendment right to identify herself, holding that the Army discharged Respondent not for the content of her speech, but for being a homosexual. Petition, App. 10a.

The court of appeals also ruled, pursuant to existing Ninth Circuit precedent, that classifications based on sexual orientation are subject only to rationality review under the Fifth Amendment. The court did not rule, however, on the merits of Respondent's claim that the regulation violated her right to equal protection of the law. Instead, the court of appeals remanded the case to the district court for "appropriate proceedings, including those directed toward determining whether the Army's discrimination is rationally related to a permissible governmental purpose." Petition, App. 20a.

In reaching its decision to remand the case, the court rejected Petitioners' reliance on *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981), for the proposition that social disapproval of homosexuality justifies the Army's regulation. The court of appeals instead held that such justifications "should not be given unexamined effect today as a matter of law." Petition, App. 15a. Having been offered no specific justification in the present case for either the Army regulation or Respondent's discharge, the court declined to accept Petitioners' unsupported assertion that the regulation is rational as a matter of law, "without any justification in the record at all." Petition, App. 18a. The court therefore remanded the case to provide the Army an opportunity to proffer

a basis for its exclusionary regulation that is rationally related to a permissible governmental purpose. Petition, App. 20a.

The court of appeals circumscribed its ruling by directing the lower court to "remain aware of the proper respective roles of the military and the judiciary in entertaining further proceedings in this case." Petition, App. 18a. Although the court acknowledged that military decisions "are not lightly to be overruled by the judiciary," *id.*, the court pointed out that deference to military judgment in the absence of any supporting factual record "would come close to denying reviewability at all," *id.* at 19a, a position not asserted by Petitioners. As the court concluded, "[t]he Army does not ask us to deny review; it asks us to uphold its regulation without a record to support its rational basis. This we decline to do." *Id.*

Following the decision of the court of appeals, Petitioners filed a petition for rehearing with suggestion for rehearing *en banc*. On May 8, 1992, the court of appeals issued a modestly amended opinion, with an order denying the petition for rehearing, again pursuant to a unanimous vote of the panel. The order stated that the full court had been advised of the suggestion for rehearing *en banc* and that not a single judge of the court of appeals had requested a vote to rehear the matter *en banc*. Petition, App. 2a.

REASONS FOR DENYING THE PETITION

I. CHANGING CIRCUMSTANCES MILITATE AGAINST REVIEW BY THIS COURT AT THIS TIME

Petitioners ask this Court to review Respondent's facial and as-applied challenge to a regulation that is in flux, with justifications that are fluctuating as well. Such review is untimely, posing great risks of mootness or the necessity of a later remand should the Court take up this matter now, before district court proceedings develop a proper record.

A. First and foremost, Respondent's challenge to the regulation is likely to have a political resolution, due to the

recent presidential election, that will obviate the need for judicial consideration of this case. President-elect Bill Clinton has stated that, upon taking office, he will immediately rescind the military's ban on service by lesbians and gay men.[2] Thus, the election of President Clinton will result in the significant revision, if not the rescission, of the regulation challenged by Respondent.[3] This Court should not expend its resources accepting review of a case in which the basic elements being challenged are likely to change significantly in the coming months. Indeed, Respondent expects that this case may well be settled once the new Administration is in place.

B. In addition, the Department of Defense itself appears to be in the process of changing its rationale for the regulation. For instance, Secretary of Defense Richard Cheney, one of the Petitioners here, acknowledged last year in testimony before Congress that the notion that gay men and lesbians are a security risk, as postulated in the military's stated rationale for the policy, is "a bit of an old chestnut." Wash. Post, Aug. 1, 1991, § 1, at A33. Shortly after that statement, the Department of Defense released a study finding that sexual orientation is not a factor in predicting security risk. *See* Wash. Post, Oct. 10,

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[2]Wash. Post, Sept. 28, 1992, § 1, at A1 ("Clinton has pledged to sign an executive order ending the U.S. military policy discriminating against homosexuals"); Los Angeles Times, Aug. 30, 1992, part A, at 15, col. 1.

[3]The effect of such a change on this case, as well as other pending challenges to the military's policy, has been expected by many to be significant. Indeed, prior to the election, Petitioners themselves sought and obtained stays of some of the pending challenges based on the speculative status of the regulation in light of the election. *See, e.g., Cammermeyer v. Cheney*, No. C-92-942Z (W.D. Wash.) (discharge of lesbian Colonel and Chief Nurse of Washington National Guard; stipulated stay of proceedings until November 30, 1992).

1992, at A20.[4] These developments signal ongoing changes in the official rationale for the policy.

Further, Petitioners' presumption that the presence of lesbians and gay men in the military will harm morale, recruitment, and the public acceptability of military service is undermined by recent information. Two independent polls have found that a substantial majority of Americans believe that gays and lesbians should be allowed to serve. *See* USA Today, June 26, 1991 at 3A; Time, Aug. 12, 1991, at 11. In fact, the poll reported in USA Today found that, when asked "If a homosexual in the armed forces is doing a good job, should that person be discharged?" 81 percent of respondents answered "no."

These and other findings are not contained in the record of this case. Absent remand, there is an inadequate record with which to evaluate the previously unexamined and currently evolving rationale asserted by Petitioners. In light of the recent presidential election, the changing rationale for the policy, and new information casting doubt on the policy's stated rationale, this Court should decline to review this case on the current record at the current time.

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[4]An earlier draft of the report described above, which was rejected by the Department for exceeding the scope of the assigned research, called for an end to the policy barring gays and lesbians from military service. N.Y. Times, Oct. 22, 1989, § 1, Part 1, at 1, col. 6. This conclusion was echoed in a report issued by the Government Accounting Office, which reviewed the military's policy and found substantial evidence undermining its stated rationale. U.S. Gen. Accounting Office, Report to Congressional Requesters, Defense Force Management: DOD's Policy on Homosexuality (June 12, 1992). At least one military commentator has publicly called for revision of the policy to exclude only those who commit acts that are shown to be prejudicial to good order and discipline. *See* Davis, Maj. Jeffrey, *Military Policy Toward Homosexuals: Scientific, Historical, and Legal Perspectives*, 131 Mil. L. Rev. 55, 105 (1991). The weekly newspapers of the Army and Air Force likewise have called on the Pentagon to end its ban on lesbians and gay men in the armed services. N.Y. Times, Aug. 30, 1992, § B, at 10, col. 6.

II. REVIEW AT THIS TIME ALSO IS PREMATURE BECAUSE NATIONAL POLICY REMAINS INTACT AND FUTURE PROCEEDINGS WILL NOT UNDULY INTERFERE WITH THE MILITARY

A. Petitioners have misstated the issue before this Court. Contrary to Petitioners' framing of the issues, the court of appeals did *not* decide that the Army's regulation violated the equal protection component of the Fifth Amendment, nor did the court of appeals "refus[e] to sustain the Regulation" or "requir[e] the Army to proceed to trial." Petition (I). All that is before this Court currently is the court of appeals' ruling on the propriety of a motion to dismiss, in which the court concluded: "We reverse the judgment of dismissal, and remand for further appropriate proceedings, including those directed toward determining whether the Army's discrimination is rationally related to a permissible governmental purpose."[5] Petition, App. 20a.

Accordingly, Petitioners' request for review of this case in its present posture is, at best, premature. While the issue raised on the merits in this case is one of national significance, the unanimous decision of the court of appeals effects no change on national policy. The court of appeals neither invalidated the policy nor expressed an opinion as to the merits of the asserted rationale for the policy. Rather, the court simply stated that Respondent's complaint may not now be dismissed based solely on Petitioners' unsupported assertion that the policy is rationally related to a permissible governmental purpose.

This decision adopts an appropriately cautious approach to a difficult issue. The court of appeals' decision does nothing more than defer final decision of a constitutional claim "in the absence of any supporting factual record." Petition, App. 19a.

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[5]There is no mandate for a trial, only a direction that the record must be developed further in order to ascertain the rationality of the Army's regulation.

This ruling so conformed to the decisions of this Court and other precedent that not one judge on the circuit requested a vote in response to Petitioners' suggestion for rehearing *en banc*. The court of appeals clearly has not so "far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 10(1)(a).

B. Petitioners premise their request for review at this time upon the stated desire "to avoid the unwarranted interference with the military chain of command that would result from proceedings on remand." Petition at 19. This concern is wholly unfounded and should not sustain a grant of certiorari at this stage. This Court has recognized the power of a district court to control discovery proceedings and protect litigants, including the government, from unwarranted interference. In *Webster v. Doe*, a challenge to alleged discrimination against lesbians and gay men by the CIA, the Court declined to forbid an inquiry into the agency's hiring and promotion policies over objections that such judicial review would entail "extensive 'rummaging around' in the Agency's affairs to the detriment of national security." 486 U.S. 592, 604 (1988). The Court observed that a district court has "the latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission."[6] *Id.* (citations omitted).

Further, the issues raised here do not relate to military tactics or strategy, nor has Respondent challenged the decision-making of any individual officer. Thus, remand will not cause

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[6]Petitioners allege that at least one litigant has sought to depose Secretary Cheney, General Powell, and Assistant Secretary Williams. Petition at 19 n.6. That request was made in a letter by a *pro per* plaintiff to counsel for the government. Petitioners do not assert that any such discovery has been allowed to proceed in any case.

"unwarranted interference with the military chain of command," as asserted by Petitioners, Petition at 19, because no military officer will be required to testify "concerning the details of their military commands . . . ." *United States v. Stanley*, 483 U.S. 669, 682-83 (1987). Instead, the policy embodied in the regulation challenged here resembles hiring policies this Court held reviewable, and subject to a reasonable factual inquiry, in *Webster*.

C. Fairly understood, Petitioners seek a ruling that the Army's regulation is unreviewable under any equal protection claim that Respondent might assert. *See* Petition, App. 13a. Yet, as noted by the court of appeals, Petitioners have not contended that judicial review is precluded under the test for reviewability of military decisions adopted in *Wallace v. Chappell*, 661 F.2d 729, 733 n.4 (9th Cir. 1981), *rev'd on other grounds*, 462 U.S. 296 (1983), one prong of which mandates consideration of "the extent to which military discretion or expertise is involved." Petition, App. 19a. The court of appeals appropriately accommodated deference to military judgment by specifically instructing the lower court to consider the respective roles of the military and judiciary in judging whether the record adequately demonstrates a rational relationship to a permissible governmental purpose. *Id.* at 18a.

This approach is entirely consistent with the directives of this Court. In *Rostker v. Goldberg*, this Court stated that "a different equal protection test" does *not* apply simply because a case arises in "the military context." *Rostker v. Goldberg*, 453 U.S. 57, 71 (1981) (citing *Schlesinger v. Ballard*, 419 U.S. 498 (1975)); *see also Frontiero v. Richardson*, 411 U.S. 677 (1973) (applying equal protection without any special deference); *Brown v. Glines*, 444 U.S. 348, 354 (1980) (servicemembers do not abandon their constitutional rights when they enter military service).

Moreover, contrary to Petitioners' assertion, Petition at 18, the decision in *Goldman v. Weinberger*, 475 U.S. 503 (1986), does not command a different result. *Goldman* raised

only a First Amendment challenge, not an equal protection claim. *See id.* at 512-13 (Stevens, J., concurring) (noting that Army rule treated all religions alike and rule might be questionable if it distinguished between religions). There, the Army presented a facially neutral and legitimate explanation for having uniform dress regulations, not an explanation, as here, concededly based on social disapproval of a particular group of people. *See* Petition at 14. Nothing in *Goldman* suggests that this Court would have upheld the Army's rejection of Goldman's request to wear a yarmulke on duty had the sole justification for the refusal been premised on the discomfort of other soldiers around Orthodox Jews. Inquiry here into whether Petitioners have a legitimate justification for the Army's regulation and whether that policy is rationally related to that justification is in no way inconsistent with the analysis set forth in *Goldman*.

In sum, the court of appeals adopted the cautious approach of remanding the case for further inquiry, rather than prematurely, and perhaps unnecessarily, reaching complex issues of constitutional dimension. This Court should exercise its power of review sparingly and avoid those instances where there is an inadequate record and no threat exists to the status quo.[7] The opportunity to address the merits of this case, in the event no political resolution is achieved first, will undoubtedly arise at a later stage of these or other proceedings.

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[7]*See, e.g., Brotherhood of L.F.&E. v. Bangor & A.R.C.*, 389 U.S. 327, 328 (1967) (denying certiorari "because the Court of Appeals remanded the case, [making] it not yet ripe for review"); *Hamilton-Brown Shoe Co. v. Wolfe Bros. & Co.*, 240 U.S. 251, 258 (1916) (lack of finality below may "of itself alone" furnish "sufficient ground for the denial of the application" for certiorari).

III. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND CREATES NO CONFLICT BETWEEN THE CIRCUITS

A. Despite Petitioners' assertion of a significant conflict between the circuits arising from the decision of the court of appeals, no such conflict exists. No other court of appeals previously has addressed the limited issue of whether a servicemember discharged solely for homosexual orientation may state a claim under the Fifth Amendment's guarantee of equal protection.

In the first place, each of the other courts that has considered the constitutionality of the military's exclusionary policy has done so in the context of a motion for summary judgment or following trial, and not pursuant to a motion to dismiss under Fed. R. Civ. P. 12(b)(6). *See Ben-Shalom v. Marsh*, 703 F. Supp. 1372, 1373 (E.D. Wisc.) (cross-motions for summary judgment), *rev'd*, 881 F.2d 454, (7th Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990); *Woodward v. United States*, 871 F.2d 1068, 1069 (Fed. Cir. 1989) (summary judgment), *cert. denied*, 494 U.S. 1003 (1990); *Dronenburg v. Zech*, 741 F.2d 1388, 1389 (D.C. Cir. 1984) (summary judgment); *Rich v. Secretary of the Army*, 735 F.2d 1220, 1224 (10th Cir. 1984) (three-day trial). Accordingly, none of those courts addressed the question of whether a lesbian or gay servicemember discharged solely because of her or his sexual orientation is precluded as a matter of law from ever raising an equal protection claim.

Moreover, the decisions cited by Petitioners are distinguishable on other grounds as well. Petitioners themselves readily concede that *Dronenburg* and *Rich* are "distinguishable because proof of particular homosexual acts was presented in those cases." Petition at 8. Similarly, despite Petitioners' claim that *Woodward v. United States* was decided solely on the basis of the plaintiff's status, the Federal Circuit expressly rejected that interpretation by acknowledging that it "need not address the

factual situation where there is action based *solely* on 'status as a person with a homosexual orientation.'" 871 F.2d at 1074 n.6. Further, Petitioners acknowledge that *Dronenburg*, *Rich*, and *Woodward* were based in part on social disapproval of homosexuality, Petition at 9, a basis that at a minimum requires further inquiry to ascertain the continuing legitimacy of the Army's motivation. *See* section III.B.2. hereof, *infra*. Finally, and perhaps most significantly, none of the courts cited by Petitioners had the benefit of recent information referred to above casting doubt on the rationality of the justifications asserted for the policy.

B. Petitioners assert that the court of appeals made three subsidiary errors of law in remanding the case to the district court: 1) "the erroneous premise that the regulation classifies servicemembers on the basis of their 'status' alone"; 2) the rejection of "social disapproval of homosexuality" as a justification for the regulation; and 3) application of "an inappropriate heightened standard of review." Petition at 9. As explained below, however, the court of appeals' ruling on each of these issues is consistent with the holdings of this Court.

1. Petitioners contend that there is no legally relevant distinction between status and conduct, since status is indicative of a "propensity" to engage in proscribed conduct. Consequently, they argue, the criminalization of sodomy in the military, *see* 10 U.S.C. § 925, justifies a regulation that excludes those the military presumes will violate the law. Petitioners are wrong for several reasons.

Fundamentally, Petitioners confuse sodomy with homosexuality. Their argument fails to recognize that the Uniform Code of Military Justice ("UCMJ") criminalizes certain sexual acts and applies with absolute equality on its face to the same acts regardless of whether they are committed by heterosexuals or homosexuals. 10 U.S.C. § 925. Because of the broad reach of this statute, it is not reasonable to presume that only homo-

sexual individuals will violate it.[8] Nevertheless, as the court of appeals correctly recognized, Army Regulation 135-175 classifies on the basis of status and not conduct because it is directed only at homosexuals.[9] *See* Petition, App. 27a (providing for retention of servicemembers who have engaged in homosexual acts but who claim a heterosexual orientation). Thus, all that is at issue on the merits in this case is whether it is constitutionally permissible to require automatic exclusion of all lesbians and gay men from service while at the same time not requiring the exclusion of any heterosexuals, not even those who have admitted engaging in criminal acts of sodomy with individuals of the same or a different sex.

Because the regulation at issue in this case uses homosexuality, not sodomy, as its basis for classification, the decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which held that a state may criminalize acts of sodomy without violating substan-

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[8]The UCMJ criminalizes heterosexual and homosexual oral and anal intercourse. Thus, heterosexuals, including married couples, have been prosecuted under 10 U.S.C. § 925 for engaging in oral or anal sex with one another. *See, e.g., United States v. Jones*, 14 M.J. 1008 (A.C.M.R. 1982); *United States v. Harris*, 8 M.J. 52 (C.M.A. 1979). Adultery is also a crime under the UCMJ. *See United States v. Hickson*, 22 M.J. 146 (C.M.A. 1986). *See also* P. Blumstein & P. Schwartz, *American Couples* 236, 242 (1983) (from 90 to 93% of heterosexual persons have engaged in oral intercourse; a smaller percentage in anal intercourse).

[9]This Court has long recognized the constitutional distinction between status and conduct. *See Robinson v. California*, 370 U.S. 660 (1962); *Powell v. Texas*, 392 U.S. 514 (1968). Writing for the Ninth Circuit in *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981), a substantive due process challenge to a prior version of the Navy's comparable regulation, Justice Kennedy recognized the distinction between homosexual status and conduct when he suggested in dictum that individualized determinations regarding eligibility for service might be appropriate for cases involving the exercise of protected activities, including "sexual personality and preference." *Id.* at 808 n.20. *See* Petition, App. 14-15a (distinguishing holding in *Beller*).

tive due process guarantees, does not control this case. The doctrinal analysis here is completely different, because Respondent asserts an equal protection claim, a question not before the Court or ruled on in *Bowers*. *See* 478 U.S. at 196 n.8.[10] Unlike the due process clause, the equal protection clause does not safeguard social convention or tradition, however longstanding or deeply ingrained.

Moreover, even if *Bowers* were read to preclude suspect or quasi-suspect scrutiny under the equal protection clause, as Petitioners argue it should be, there is no conflict presented by the ruling at bar because the court of appeals required only rational basis review. In sum, *Bowers* does not in any way alter the propriety of this Court declining to review the decision below to remand this case for a determination of whether the regulation at issue is rationally related to a permissible governmental purpose.

2. Petitioners also claim that the court of appeals erred in failing to uphold the right of the Army to justify its regulation on the bare assertion of social disapproval of homosexuality. Petition at 14. Petitioners have misunderstood the directives of this Court and the ruling of the court of appeals. The court of appeals' decision, in accordance with the decisions in *Palmore v. Sidoti*, 466 U.S. 429 (1984), and *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), states only that the military's policy may not be based upon private biases or the prejudice of others. The court carefully distin-

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[10] *See generally*, Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. Chi. L. Rev. 1121 (1988) (discussing *Bowers*). This Court has made clear that one cannot simply import reasoning dealing with one aspect of the Constitution into the analysis of a different portion of the Constitution. *See Nollan v. California Coastal Commission*, 483 U.S. 825, 834 n.3 (1987). Voting rights cases provide one example of this. While a state constitutionally may limit all individuals' vote on a particular matter, the state may not constitutionally make an invidious distinction between groups in access to the vote. *See, e.g., Gordon v. Lance*, 403 U.S. 1 (1971).

guished those instances where action is based upon "disapproval of specific acts of criminal conduct . . . ." Petition, App. 14a. The court of appeals thus merely followed the previous rulings of this Court and multiple lower courts that adverse government action against a particular group of people does not serve a legitimate governmental interest if it is premised on antipathy arising from prevailing fears of, prejudice toward, or stereotypes about the group's members.[11] Indeed, mere social disapproval,

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[11] *See, e.g., Cleburne*, 477 U.S. at 448 ("mere negative attitudes, or fear, . . . are not permissible bases" for differential treatment of the mentally retarded); *Bannum, Inc. v. City of Fort Lauderdale*, 901 F.2d 989, 999 & n.30 (11th Cir. 1990) (vacating summary judgment and remanding for analysis of whether withdrawal of zoning approval for residential program for formerly incarcerated individuals was based on mere negative attitudes or fear); *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1224-25 (2d Cir. 1987) (governmental body may not escape liability for violation of equal protection where discriminatory action was undertaken in response to the racist attitudes of the majority of its constituents) (listing and discussing cases), *cert. denied*, 486 U.S. 1055 (1988); *Sullivan v. City of Pittsburgh*, 811 F.2d 171, 185 (3d Cir.) (upholding injunction against closure of alcoholic treatment center where plaintiffs "demonstrated that the City took its essentially unjustified action in an atmosphere charged with hostility towards a minority group."), *cert. denied*, 484 U.S. 849 (1987); *J. W. v. City of Tacoma*, 720 F.2d 1126, 1129 (9th Cir. 1983) (invalidating application of ordinance where legislative purpose was based on "archaic and stereotypic notions" about the mentally ill); *Burstyn v. City of Miami Beach*, 663 F. Supp. 528, 537 (S.D. Fla. 1987) ("Where fear and prejudice [of elderly] are a motivating factor in passage of an ordinance, a violation of the equal protection clause results."). Similarly, religious beliefs behind such moral judgments or social disapproval cannot provide a legitimate purpose to a discriminatory policy. *See, e.g., Marks v. City of Chesapeake*, 883 F.2d 308, 311 (4th Cir. 1989) (denial of permit to practice palmistry as "rituals" believed to be heretical not a legitimate purpose; officials cannot act solely "in reliance on public distaste for certain activities"); *Islamic Center of Mississippi v. City of Starkville*, 840 F.2d 293, 302 (5th Cir. 1988) (neighbors' negative attitudes and fears not a permissible basis for distinguishing between familiar and unfamiliar religions).

has never been an appropriate justification for a discriminatory policy in light of the fact that the very purpose of the equal protection doctrine is to protect minorities, who frequently are targets of social disapproval, from abuse at the hand of the majority.[12] Remand for examination of whether the Army's goals are indeed legitimate is therefore supported by the caselaw and does not warrant review by this Court.

3. Finally, Petitioners are wrong in asserting that the court of appeals applied "an inappropriate heightened standard of review." Petition at 9. The court explicitly recognized that, under existing precedent, it was foreclosed from applying heightened scrutiny to Respondent's claim. Petition, App. 16a. Accordingly, the court of appeals did not apply heightened scrutiny. Relying on this Court's decision in *Cleburne, supra*, the court of appeals merely remanded the case to give Petitioners an opportunity to demonstrate on the record whether the regulation is rationally related to a permissible governmental purpose.[13] This was entirely in accordance with pre-existing circuit precedent. *See High Tech Gays v. Defense Industrial Security Clearance Office* ("DISCO"), 895 F.2d 563

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[12] *See e.g., Palmore, supra*, 466 U.S. at 433 (racial prejudice of others cannot justify denial of custody to interracial couple); *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534-35 (1973) (food stamp legislation intended to discriminate against hippies based on impermissible purpose); *see generally Developments in the Law – Sexual Orientation and the Law*, 102 Harv. L. Rev. 1508, 1568-70 (1989); Sustein, *supra* n.10, at 167-68.

[13] In *Cleburne*, the Court struck down the application of a zoning regulation to a home for mentally retarded individuals based on the failure of the City to demonstrate on the record a rational basis for its requirement of a special use permit. As the court of appeals pointed out, the Court rejected as illegitimate the City's proffered justification of the negative fears and attitudes of neighbors and found the requirement irrational in light of the failure to impose a similar requirement on other group homes. *See Cleburne*, 473 U.S. at 448-49; Petition, App. 16-17a.

(9th Cir. 1990), (upholding on summary judgment DISCO's policy of conducting expanded security investigations for persons reporting lesbian or gay sexual conduct based on evidence in the record establishing legitimate rational basis for the policy);[14] *Dubbs v. CIA*, 866 F.2d 1114 (9th Cir. 1989) (remanding claim of disparate treatment of lesbians and gay men in security clearance determinations to permit a factual inquiry into the CIA's policy and its justifications).

The appropriateness of a factual backdrop to perform rationality review adequately has been recognized by numerous other circuits. For example, in *Mahone v. Addicks Util. Dist.*, 836 F.2d 921 (5th Cir. 1988), the Fifth Circuit remanded an equal protection claim that had been rejected by the district court on a motion to dismiss for failure to state a claim. Recognizing that a number of factors, including the facts pleaded by a plaintiff, the state of knowledge of the court, and the complexity of the official action being challenged, affect the appropriateness of looking beyond the pleadings to perform a rational relationship analysis, the court declined to "fashion a single rule for all circumstances" and remanded the case for development of "a factual backdrop." *Id.* at 937; *see also Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 471-72 (8th Cir. 1991) (remanding for determination of rational basis where record consisting of conclusory statements by city officials failed

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[14]The decision in *High Tech Gays* demonstrates that changing factual circumstances may erode a presumed or prior factual basis for governmental policy. DISCO based its policy requiring such expanded investigations on evidence suggesting that the KGB had been known to target suspected homosexual individuals. *High Tech Gays*, 895 F.2d at 578. However, with the demise of the Soviet Union and the dismantling of the KGB, and the release of new Department of Defense research concluding that sexual orientation is *not* a factor in predicting security risk, *see* Wash. Post, Oct. 10, 1991, at A20, the basis for the ruling in *High Tech Gays* may not justify continued application of the policy challenged in that case and does not establish a rational basis for the broader exclusionary policy challenged by Respondent.

to justify unequal treatment); *Bannum, Inc. v. City of Fort Lauderdale*, 901 F.2d 989, 999 & n.30 (11th Cir. 1990) (remanding equal protection claim for factual inquiry into justifications unrelated to unsubstantiated fears and negative attitudes); *Phan v. Virginia*, 806 F.2d 516, 522-23 (4th Cir. 1986) (hypothesizing legitimate purpose but remanding for determination of fit between purpose and classification).

The court of appeals did not stray from this well-considered authority. Petitioners' repeated complaint that such review constitutes "heightened scrutiny," Petition at 7, 9, and 17, is unfounded. The decision of the court of appeals does not require Petitioners to establish that its policy is "substantially related to a sufficiently important governmental interest." *Cleburne*, 473 U.S. at 441. Rather, it need only be determined that the Army's policy is rationally related to a legitimate governmental interest. Given the complexity of the issues presented by Respondent's challenge, the court of appeals' ruling that such a showing is required was appropriate in this case and does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 9, 1992

SUPREME COURT, U.S.
FILED
NOV 10 1992
OFFICE OF THE CLERK

No. 92-389

In the Supreme Court of the United States

OCTOBER TERM, 1992

RICHARD CHENEY, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

DUSTY PRUITT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Respondent misstates the issue before this Court by characterizing it as "whether a lesbian or gay servicemember discharged solely because of her or his sexual orientation" has stated an equal protection claim. Br. in Opp. 13. The Army's regulation—which respondent never cites—is quite specific in making clear that it proscribes certain types of *conduct*, not sexual orientation. The regulation's statement of policy provides that "[t]he presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military

mission." Army Regulation (AR) 135-175, § VII, ¶ 2-37(a). The regulation goes on to specify that three types of evidence, unless rebutted, support the conclusion that a servicemember has engaged in homosexual conduct or is likely to do so: (1) direct proof that the servicemember "has engaged in, attempted to engage in, or solicited another to engage in a homosexual act," (2) a statement by the servicemember that "he/she is a homosexual or bisexual," and (3) proof that the servicemember "has married or attempted to marry a person known to be of the same biological sex." AR 135-175, § VII, ¶2-39. In this case, the evidence considered by the Army Reserve Elimination Board showed both that respondent admitted that she is a lesbian and that she had twice gone through marriage ceremonies with other women. Pet. App. 4a-6a.[1] Respondent's various arguments supporting her contention that review is not warranted each dissolve once it is understood that

[1] Citing the Excerpt of Record at 224-225 (Br. in Opp. 4 n.1), respondent states that "[t]he findings of the Board show that the [marriage] ceremonies were *not* the basis for her discharge." The record shows no such thing. The pages respondent cites, which are from the "summarized proceedings of officer elimination action," show that the newspaper article reporting that respondent had twice married other women was entered into evidence over respondent's objection. The summarized findings go on to say "[t]hat the criteria of Paragraph 2-39 of AR 135-175 have been met." That paragraph of the regulation includes the provision stating that the Army normally will conclude that a servicemember has engaged in homosexual conduct or has a propensity to do so if "[t]he member has married or attempted to marry a person known to be of the same biological sex."

respondent was not discharged merely on account of her sexual orientation, but because application of the regulation to the facts in evidence showed that she has engaged in homosexual conduct and has a propensity to engage in homosexual conduct.

1. The primary reason petitioner offers for denying the petition is that President-elect Clinton "has stated that, upon taking office, he will immediately rescind the military's ban on service by lesbians and gay men." Br. in Opp. 7. This Court should not make its docketing decisions based on statements made by candidates running for public office. The current policy remains in full force; whether it will be changed, when, and how are purely matters of extra-record speculation that should not affect the need for this Court to grant review to resolve the existing conflict among the circuits on a matter of national importance.[2]

In any event, Mr. Clinton's position has been reported to be "that while sexual orientation is a gay man's or lesbian's own business, the issue should be whether they have 'done anything which would disqualify them' from service." *Clinton Says He'll 'Consult' On Allowing Gays in Military*, Wash. Post, Nov. 13, 1992, at A1, col. 3, A11. Acts of sodomy—which are prohibited by the criminal laws of many States, the Uniform Code of Military Justice

[2] Respondent incorrectly suggests (Br. in Opp. 7 n.3) that the government obtained a stay of proceedings in *Cammermeyer* v. *Cheney*, No. C-92-942Z (W.D. Wash.) on account of the pending election. In fact, the government sought a stay pending disposition of this case. Motion of Federal Defendants for a Stay of Proceedings at 4.

(10 U.S.C. 925), and by the laws of many nations where troops might be stationed (see Pet. 11, 15; *Beller* v. *Middendorf*, 632 F.2d 788, 811 (9th Cir. 1980), certs. denied, 452 U.S. 905 and 454 U.S. 855 (1981))—may be disqualifying.[3] Indeed, Mr. Clinton recently stated his intention to establish a committee to study the question. *Clinton Says He'll 'Consult' On Allowing Gays In Military*, Wash. Post, Nov. 13, 1992, at A1, col. 3; *Nunn, Dole Urge Caution On Military Gay Policy*, Wash. Post, Nov. 16, 1992, at A11, col. 1.

2. The second argument respondent offers in support of her contention that review is not warranted is that "review of this case in its present posture is, at best, premature." Br. in Opp. 9. To the contrary, further proceedings in the district court in this case most likely would be a waste of time. The justification for the military's policy is stated on the face of AR 135-175, and is grounded in part on social disapproval of homosexual conduct.[4] The court of appeals

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[3] Respondent states that we "confuse sodomy with homosexuality" (Br. in Opp. 14) because heterosexuals may commit acts of sodomy. Respondent overlooks the fact that "[s]odomy is an act basic to homosexuality * * * [and] is the primary form of homosexual activity." *Watkins* v. *United States Army*, 837 F.2d 1428, 1455 (9th Cir. 1988) (Reinhardt, J., dissenting), vacated, 875 F.2d 699 (9th Cir. 1989) (en banc), cert. denied, 111 S. Ct. 384 (1990). Unlike a propensity to commit homosexual acts, a propensity to commit heterosexual acts does not necessarily translate into a propensity to commit sodomy.

[4] AR 135-175, § VII, ¶ 2-37(a) provides in relevant part:

> The presence of [homosexual] members adversely affects the ability of the armed forces to maintain discipline, good

refused to uphold the military's policy on the basis of the justification provided by the military, but instead remanded with instructions that the district court disregard any justification of the regulation based on social disapproval of homosexuality. Pet. App. 14a-15a.

The court of appeals' decision is wrong. This Court in *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), sustained a *criminal* statute proscribing homosexual acts. And in *Beller* v. *Middendorf*, *supra*, the Ninth Circuit (per Kennedy, J.) correctly concluded, in upholding a discharge decision, that "[t]he Navy can act to protect the fabric of military life, to preserve the integrity of the recruiting process, to maintain the discipline of personnel in active service, and to insure the acceptance of men and women in the military, who are sometimes stationed in foreign countries with cultures different from our own." 632 F.2d at 811. But more to the point at this stage of the case, the fact is that the court of appeals has instructed the district court to review the military's policy, but to disregard many of the justifications for the policy that are set out in the Army's regulation. There is little point to such an exercise.

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order, and morale; to foster mutual trust and confidence among members; to insure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of members who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the Armed Forces; to maintain the public acceptability of military service; and to prevent breaches of security.

3. The third reason respondent provides for denying the petition is that the decision of the court of appeals in this case does not conflict with any decision of this Court or any other court of appeals. Respondent is wrong on both counts.

Respondent says that the regulation does not conflict with this Court's decision in *Bowers* v. *Hardwick* because "the regulation at issue in this case uses homosexuality, not sodomy, as its basis for classification." Br. in Opp. 15. As we have stated, however, that claim flies in the face of the regulation at issue, which provides for the discharge of "persons who engage in homosexual conduct" or "demonstrate a propensity to engage in homosexual conduct." AR 135-175, § VII, ¶ 2-37(a). And it is unrealistic, to say the least, for respondent to suggest that the Army cannot reasonably infer that she has engaged in or has a propensity to engage in homosexual acts, since she has stated that she is a lesbian and has twice married other women. See *Ben-Shalom* v. *Marsh*, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990).

Similarly, with respect to the decisions of the courts of appeals, respondent claims that they are distinguishable because none of them arose from a situation where "a lesbian or gay servicemember [was] discharged solely because of her or his sexual orientation." Br. in Opp. 13. As we have explained, this case does not involve such a situation either. But proof of particular homosexual acts was not presented in *Ben-Shalom* v. *Marsh*, 881 F.2d at 464, or *Woodward* v. *United States*, 871 F.2d 1068, 1074 n.6 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990), yet the

courts of appeals upheld the discharges at issue in those cases. So if respondent contends that a homosexual servicemember may not be discharged in the absence of evidence of particular acts of sodomy, that claim cannot be reconciled with the holdings of the Seventh Circuit and the Federal Circuit.

4. Finally, respondent does not dispute that the government's petition presents an important legal issue. Nor does she dispute that the resolution of the question presented will affect a number of pending cases. In light of the conflict in the circuits, this Court should decide whether the military's policy of discharging servicemembers who engage in, or have a propensity to engage in, homosexual conduct violates the equal protection component of the Fifth Amendment.

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

KENNETH W. STARR
Solicitor General

NOVEMBER 1992